LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY,
APPELLANT,

vs.

ARIZONA STATE TAX COMMISSION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

FILED MAY 28, 1964
PROBABLE JURISDICTION NOTED OCTOBER 12, 1964.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY,
APPELLANT,

vs.

ARIZONA STATE TAX COMMISSION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Arizona		
Abstract of record on appeal from the Superior Court of the State of Arizona in and for the County of Maricopa	1	1
Complaint for declaratory judgment	4	1
Answer	12	6
Plaintiff's motion for summary judgment	20	9
Defendants' motion for summary judgment	20	10
Summary judgment	21	10
Minute entries	24	12
Notice of appeal	27	14
Appeal bond	29	15
Designation of record on appeal (omitted in printing)	31	16

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 30, 1964

	Original	Print
Excerpts from appellant's opening brief	33	16
Supplemental abstract of record on appeal from the Superior Court of the State of Arizona in and for the County of Maricopa	64	17
Stipulation as to facts in lower court filed in Supreme Court of the State of Arizona	67	17
Memorandum of opinion, McFate, J.	71	19
Opinion, Struckmeyer, J.	132	21
Dissenting opinion, Lockwood, J.	144	31
Excerpts from appellant's motion for rehearing and memorandum in support attached thereto	161	44
Excerpt from response to petition for rehearing	181	47
Notice of minute entries of orders of January 7, 1964—Order denying motion for rehearing, etc.	187	48
Mandate	188	49
Notice of appeal to the Supreme Court of the United States	192	51
Triple certificate (omitted in printing)	197	54
Order noting probable jurisdiction	199	54

[fol. 1] [File endorsement omitted]

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

WARREN TRADING POST COMPANY, a corporation, Appellant,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

Abstract of Record on Appeal—Filed March 30, 1960

[fol. 4]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. 101942

WARREN TRADING POST COMPANY, a corporation, Plaintiff,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as Members of the Arizona State Tax Commission, and THE ARIZONA STATE TAX COMMISSION, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT—
Filed August 26, 1958

First Cause of Action

Comes now the above-named plaintiff, and for its First Cause of Action against defendants, alleges as follows:

I

Plaintiff is a corporation, organized and existing under the laws of the State of Arizona.

II

The individual defendants are the duly elected, quali-
[fol. 5] fied and acting members of the Arizona State Tax Commission, among whose duties is the duty to enforce the Excise Revenue Acts of the State of Arizona. The defendant Commission is the Arizona State Tax Commission created by A. R. S. §42-101.

III

During all of the times mentioned in this complaint, plaintiff corporation was licensed by the United States Commissioner of Indian Affairs to conduct a trading post at Kayenta on the Navajo Indian Reservation in the County of Navajo, State of Arizona, on lands leased by plaintiff from the Navajo Indian Tribe.

IV

During all of said times mentioned in this complaint, plaintiff conducted a general merchandise business at said trading post, and a large portion of its sales were made to Reservation Indians whose homes were on said Navajo Reservation.

[fol. 6]

V

On February 25, 1958, defendant Arizona State Tax Commission made a corrected assessment against plaintiff, under the terms of which assessment plaintiff was and is obligated to pay a privilege sales tax to the State of Arizona upon sales made by plaintiff at its said trading post located on the Navajo Indian Reservation to Reservation Indians residing upon said Indian Reservation. That said corrected assessment, as appears from a copy thereof which is attached to and made a part of this complaint by reference as Exhibit "A", shows a Privilege sales tax levied against plaintiff for the period from November 1,

1956 to December 31, 195[illegible] in the sum of $2,886.49. That said tax was assessed against plaintiff under the provisions of A. R. S. §42-1312 and regulation .18.5 of defendant's Transaction and Use Tax Regulations.

VI

Defendant Arizona State Tax Commission, through its [fol. 7] representatives, has demanded of plaintiff the payment of said tax, and is now seeking to collect the same although plaintiff has repeatedly advised defendant that plaintiff is not liable for said tax and that defendant is without jurisdiction to impose the same upon plaintiff.

Wherefore, plaintiff prays judgment that the Court declare the rights of the parties hereto to be:

1. That defendant Arizona State Tax Commission has no jurisdiction or authority to impose upon plaintiff the privilege sales tax set forth in the corrected assessment described in and attached to plaintiff's complaint;

2. That the tax provided by A. R. S. §42-1312 does not apply to sales by a licensed Trader on an Indian Reservation to Reservation Indians residing on said Reservation;

3. That the tax imposed by the defendant Commission under A. R. S. §42-1312 upon plaintiff as set forth in [fol. 8] plaintiff's complaint constitutes an interference with the exclusive power of the Congress to regulate commerce with the Indian Tribes as provided in Section 8, Article I of the Constitution of the United States.

For such other and further relief as may appear to the Court to be just in the premises.

Snell & Wilmer, By Perry M. Ling, Attorneys for Plaintiff, 400 Security Building, Phoenix, Arizona.

Second Cause of Action

Comes now the above plaintiff, and for its Second Cause of Action alleges:

I

Realleges all of Paragraphs I, II, III, IV, V and VI of plaintiff's First Cause of Action as though the same were fully set forth herein.

II

On or about October 15, 1956, defendant Arizona State Tax Commission adopted consolidated transaction and use [fol. 9] tax regulations under the provisions of Chapter 9, Title 41, A. R. S., which regulations ever since have been and now are in full force and effect.

III

Among such regulations so adopted by said defendant was a regulation dealing with "Sales to the United States", numbered .18.5 which reads as follows:

"Trading Posts on Indian Reservations.

A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

IV

Persons affected by rules such as regulation .18.5 may seek a declaratory judgment with reference thereto under the provisions of A. R. S. §41-1007 which reads in part as follows:

[fol. 10] "§41-1007. Declaratory judgment and other remedies.

A. Any person who is or may be affected by a rule may obtain a judicial declaration of the validity of the

rule by filing an action for declaratory relief in the superior court of Maricopa County, in accordance with the provisions of article 2 of chapter 10, title 12."

V

Plaintiff is a person affected by the above rule in that plaintiff is a Trader duly licensed as such by the Commissioner of Indian Affairs and is conducting a trading post at Kayenta, on the Navajo Indian Reservation in Navajo County, Arizona, on land leased by plaintiff from the Navajo Indian Tribe. Defendant Commission has invoked said rule against plaintiff in making and levying the assessment against plaintiff set forth in Paragraph V of Plaintiff's First Cause of Action and adopted by reference as a part of this cause of action.

Wherefore, plaintiff prays judgment that the Court declare the rights of the parties hereto with reference to said Rule .18.5 to be that:

[fol. 11] 1. Defendant Arizona State Tax Commission is without jurisdiction or authority to impose upon plaintiff a privilege sales tax upon sales made by plaintiff to Reservation Indians at plaintiff's trading post on the Navajo Indian Reservation;

2. The tax imposed by said Rule constitutes an interference with the exclusive power of the Congress to regulate commerce with the Indian Tribes as provided by Section 8, Article I of the Constitution of the United States;

3. The tax imposed by said Rule constitutes an interference with the right of the Commissioner of Indian Affairs to fix the price at which commodities handled by a licensed Indian Trader should be sold;

For such other and further relief as to the Court may seem just in the premises.

Snell & Wilmer, By Perry M. Ling, Attorneys for Plaintiff, 400 Security Building, Phoenix, Arizona.

[fol. 12] Exhibit A, attached to the Complaint, is a photocopy of the Corrected Assessment made by the State Tax Commission covering sales by plaintiff to Reservation Indians from plaintiff's trading post on the Indian Reservation, which Corrected Assessment stated a balance due the Tax Commission in the sum of $2,886.49. This Corrected Assessment indicates the same was approved by the Tax Commission on February 25, 1958 and covers a period from November 1, 1956 to December 31, 1957. The Corrected Assessment also shows the total cash receipts of plaintiff, the total deductions and the balance claimed by the Tax Commission to be subject to the 2% sales tax.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ANSWER—Filed September 5, 1958

Answer to First Cause of Action

Comes now the defendant, State Tax Commission of Arizona, and in answer to plaintiff's complaint, First Cause [fol. 13] of Action, states as follows:

I.

That it admits the allegations contained in Paragraphs I, II, III and IV of plaintiff's complaint.

II.

That it admits the allegations contained in Paragraph V of plaintiff's complaint except that the regulation in question is not properly cited and should be designated as regulation number 2.18.5 of the State Tax Commission's Transaction and Use Tax Regulations.

III.

That it admits that it has demanded of plaintiff the payment of the tax in question and is presently seeking to collect the same, but it denies that the plaintiff is not liable

for said tax or that the State Tax Commission of Arizona is without the jurisdiction or power to impose upon and collect the same from the plaintiff.

[fol. 14] Answer to Second Cause of Action

Comes now the defendant, State Tax Commission of Arizona, and in answer to plaintiff's complaint, Second Cause of Action, states as follows:

I.

That it admits the allegations contained in Paragraph I of plaintiff's complaint insofar as the plaintiff's Second Cause of Action adopts and realleges Paragraphs I, II, III, IV and V of plaintiff's complaint, First Cause of Action, except that it denies the allegations of that Paragraph insofar as it adopts and realleges Paragraph VI of the First Cause of Action of plaintiff's complaint. To that extent, the defendant State Tax Commission of Arizona herein incorporates by reference its entire answer as set forth above.

II.

That it admits the allegations contained in Paragraphs II and III of plaintiff's complaint except that it herein re-
[fol. 15] iterates that the regulation in question is properly cited as number 2.18.5.

III.

That it admits that the provisions of the Administrative Procedure Act, A.R.S. §41-1007, establish a proper remedy by Declaratory Judgment action for persons affected by certain rules adopted under the Administrative Procedure Act, but alleges that such statutory remedy does not and should not be construed to abolish the State Tax Commission's right to levy and collect taxes and demand payment under the protest payment provisions of the Excise Revenue Act, A.R.S. §42-1338 and 42-1339. It further alleges that it does not herein waive its rights to demand that the statutory procedure cited above be followed.

V.

That it admits the allegations contained in Paragraph V of plaintiff's complaint.

That by way of further and separate answer, the defen- [fol. 16] dant, State Tax Commission of Arizona, an administrative agency, alleges:

(a) That the tax assessed against and demanded from the plaintiff is assessed on the basis of retail sales within the State of Arizona by reason of its doing business in the State under the provisions of the Excise Revenue Act, a legislative expression of the taxing powers of the sovereign State of Arizona.

(b) That the tax imposed by the State Tax Commission of Arizona is a valid exercise of the sovereign taxing powers of the State of Arizona under the express provisions of A.R.S. § 42-1312 of the Excise Revenue Act.

(c) That the assessment is valid, lawful and constitutional.

(d) That the assessment is made under a regulation [fol. 17] promulgated by the Commission which is a valid, lawful and constitutional regulation and that said regulation does not constitute an interference with the exclusive power of Congress to regulate commerce with the Indian tribes, nor does it violate the Constitution of the United States.

(e) That the tax imposed by the State Tax Commission of Arizona does not constitute an interference with any rights of the U. S. Commissioner of Indian Affairs.

(f) That the tax imposed by the State Tax Commission of Arizona applies to sales by a licensed trader on an Indian Reservation to Indians residing on said reservation just as it applies to all other taxable retail sales within the State of Arizona and that the [fol. 18] plaintiff is not entitled to any tax exemption or deduction upon the sales in question.

(g) That both the imposition of the tax and the rules and regulations which form the basis for the tax are valid, lawful and constitutional exercises of the taxing and rule making powers of the State Tax Commission of Arizona, an administrative agency.

(h) That the plaintiff is not entitled to any deductions or exemptions under the levy and assessment in question and that the plaintiff has the burden of proving entitlement to any deduction or exemption, as well as the burden of showing that the tax in question is unlawful or inapplicable and that the plaintiff should be held to strict proof thereof.

[fol. 19] (i) That the State Tax Commission of Arizona, an administrative agency, does not waive any of its rights under the statutes of the State by submitting to the jurisdiction of this Court for a determination of this actual and justiciable controversy.

Wherefore, the defendant prays that the plaintiff take nothing by its complaint and that the same be dismissed and that the tax imposed by the State Tax Commission be upheld and declared valid, and that the rules and regulations upon which the tax is based be upheld and declared valid.

Respectfully submitted,

Robert Morrison, The Attorney General, By Robert G. Mooreman, Assistant Attorney General.

[fol. 20]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed March 5, 1959

Comes now the Warren Trading Post Company, a corporation, plaintiff herein, by its attorneys of record, and hereby moves the Court for a Summary Judgment in favor of the plaintiff and against the defendant.

This motion is based upon the pleadings and record in the file herein and upon the memorandum attached hereto.

Respectfully submitted,

Perry M. Ling, for Snell & Wilmer, Attorneys for Plaintiff, 400 Security Building, Phoenix, Arizona.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—
Filed April 15, 1959

Come now the defendants, Thad M. Moore, Warren Peterson and W. E. Stanford, as members of the Arizona State Tax Commission, and The Arizona State Tax Com- [fol. 21] mission, by The Attorney General, and pursuant to Rules Civ. Proc., Rule 56, move the Court for a summary judgment in favor of the defendants, and each of them, and against the plaintiff, for the reason that the pleadings, stipulation as to facts, and record in this action disclose that there is no genuine issue between the parties as to any material fact, and that the defendants, and each of them, are entitled to a summary judgment against plaintiff as a matter of law.

Dated this 14th day of April, 1959.

Wade Church, The Attorney General, By Leslie C. Hardy, Chief Assistant Attorney General.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

SUMMARY JUDGMENT—October 7, 1959

The issues in this action are joined by the pleadings of [fol. 22] the respective parties; stipulation as to facts signed by counsel for the respective parties; the record; and motions for summary judgments made and filed by the plaintiff and defendants respectively.

The matter was presented to the Court on May 15, 1959 upon written briefs and oral arguments by counsel for the respective parties, Perry M. Ling, Esq., of the firm of Snell & Wilmer, appearing for plaintiff, and Leslie C. Hardy, Esq., Chief Assistant Attorney General, appearing on behalf of the Attorney General for the respective defendants; and the Court thereafter having had the motions for summary judgments under advisement, on September 9, 1959, filed a memorandum opinion which was accompanied by an order granting the defendants' motion for summary judgment and denying the plaintiff's motion for summary judgment.

It Is Now, Therefore, Ordered, Adjudged and Decreed, that the defendants, as constituting the members of the Arizona State Tax Commission, and the Arizona State Tax [fol. 23] Commission, have summary judgment against plaintiff for transaction privilege taxes assessed by the defendants against the plaintiff for sales of tangible personal property made by plaintiff, as a licensed Indian trader, to Reservation Indians, which sales were made by plaintiff at its Trading Post on the Navajo Indian Reservation within the State of Arizona, between the 1st day of November, 1956, to and including the 31st day of December, 1957, in the total amount of $2,886.49, together with interest thereon at the rate of ½ of 1% per month, or fraction of a month, from the date of this judgment until paid.

Given and dated this 7th day of October, 1959.

Yale McFate, Judge of the Superior Court.

Approved as to form this 1st day of October, 1959.

Snell & Wilmer; By: Perry M. Ling, Attorneys for Plaintiff.

[fol. 24]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—March 20, 1959

Hon. Henry S. Stevens, Judge.

Order setting Mar 5 Pltf's Motion for Summary Judgment (1) for Special Argument on March 27, 1959, at 10:00 o'clock A.M. in Div. 8.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—March 27, 1959

Hon. Yale McFate, Judge.

Mar 5 Pltf's Motion for Summary Judgment (2). Order vacating time set for special argument on motion for summary judgment herein, on stipulation of the parties, to be reinstated on stipulation.

[fol. 25]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—May 1, 1959

Hon. Henry S. Stevens, Judge.

Order setting Apr 15 Defts' Motion for Summary Judgment (1) for Special Argument, May 15, 1959, at 10:00 o'clock A.M. in Div. 8.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—May 15, 1959

Hon. Yale McFate, Judge.

Apr 15 Deft's Motion for Summary Judgment (2). Order taking motion for summary judgment under advisement.

[fol. 26]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Division No. 8
101942

[Title omitted]

MINUTE ENTRY—September 9, 1959

Yale McFate, Judge.

This matter has been under advisement.

Order granting defendants' motion for summary judgment herein.

Order denying plaintiff's motion for summary judgment herein.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Division No. 8
101942

[Title omitted]

MINUTE ENTRY—October 7, 1959

Yale McFate, Judge.

Order approving formal written Summary Judgment now presented to the Court, dated, signed and approved.

[fol. 27]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Division No. 8
101942

[Title omitted]

MINUTE ENTRY—December 4, 1959

Yale McFate, Judge.

Order approving appeal bond of $5,772.98.
Order staying execution during pendency of appeal.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. 101942

[Title omitted]

NOTICE OF APPEAL—December 4, 1959

[fol. 28] To: Thad M. Moore, Warren Peterson and W. E. Stanford, as Members of the Arizona State Tax Commission; to the Arizona State Tax Commission, defendants in the above entitled action, and to the Honorable Wade Church and Leslie C. Hardy, Attorney General of the State of Arizona, and Chief Assistant Attorney General, respectively, Counsel for the above named defendants, and their attorneys of record:

Notice Is Hereby Given that the above named plaintiff, Warren Trading Post Company, a corporation, hereby appeals to the Supreme Court of the State of Arizona from the Judgment made and entered in the above entitled cause by the Superior Court of the State of Arizona in and for the County of Maricopa on the 7th day of October, 1959, and from the whole thereof, which Judgment denied plaintiff's Motion for Summary Judgment in the amount of

$2,886.49, plus interest at the rate of one-half of one per cent (½ of 1%) per month from October 7, 1959, until paid.

[fol. 29] Dated this 4th day of December, 1959.

Snell & Wilmer, By Edward Jacobson, Counsel for plaintiff, Warren Trading Post Company, a corporation, 400 Security Building, Phoenix, Arizona.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

APPEAL BOND—Approved December 4, 1959

Whereas, the above named plaintiff, Warren Trading Post Co., a corporation, has appealed to the Supreme Court of the State of Arizona from the judgment rendered in the above entitled court action in the above entitled court on October 7, 1959, in favor of the above named defendant, Thad M. Moore, Warren Peterson & W. E. Stanford as members of the Arizona State Tax Commission, and the Arizona State Tax Commission for Two Thousand Eight Hundred Eighty Six Dollars and 49/100th (2,886.49) and,

[fol. 30] Whereas plaintiff, Warren Trading Post Co., a corporation is desirous of suspending the execution of the judgment so appealed from.

Now, Therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby, jointly and severally, undertake and promise and do acknowledge ourselves, jointly and severally, bound unto said defendants in the sum of Five Thousand Seven Hundred Seventy Two Dollars and 98/100th (5,772.98) conditioned that said plaintiff, Warren Trading Post Co., a corporation will prosecute its appeal with effect and will satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and will satisfy in full such modification of the judgment and such cost, interest and damages as the Appellate Court may adjudge and award against it.

Dated this 3rd day of December, 1959.

Warren Trading Post Co., A member of the firm, By: Edward Jacobson of Snell & Wilmer, Counsel for Plaintiff, Warren Trading Post Co.

[fol. 31] Maryland Casualty Company, By: Durand R. Eaton, Attorney-in-Fact.

Approved this 4th day of December, 1959.

Yale McFate, Judge.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DESIGNATION OF RECORD ON APPEAL—Filed December 10, 1959
(omitted in printing)

[fol. 33] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

WARREN TRADING POST COMPANY, a corporation, Appellant,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

EXCERPTS FROM APPELLANT'S OPENING BRIEF
—Filed July 29, 1960

* * * * * * *

[fol. 57] PROPOSITION OF LAW NO. 3

A STATE PRIVILEGE TAX ON A LICENSED INDIAN TRADER INTERFERES WITH THE SOLE POWER OF CONGRESS TO REGULATE COMMERCE WITH THE INDIAN TRIBES AND IS INVALID.

* * * * * * *

[fol. 62] We submit that sales of merchandise by a licensed Indian Trader to an Indian Tribe or to the individual Indians of that tribe on the Reservation constitute commerce with the Indian Tribes within the meaning of Article 1, Section 8, Clause 3 of the Constitution and that any state imposed tax for the privilege of carrying on such commerce is invalid.

* * * * * * *

[fol. 63] Respectfully submitted

Snell & Wilmer, Perry M. Ling, Attorneys for Appellant, 400 Security Building, Phoenix, Arizona.

[fol. 64] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

WARREN TRADING POST COMPANY, a corporation, Appellant,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

SUPPLEMENTAL ABSTRACT OF RECORD
—Filed September 8, 1960

[fol. 67]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

[Title omitted]

STIPULATION AS TO FACTS IN LOWER COURT
—September 1, 1960

It Is Hereby Stipulated by and between Perry L. Ling, of the firm of Snell & Wilmer, attorneys for the above

Appellant, and Leslie C. Hardy, Chief Assistant Attorney General, attorney for the Appellees, that the following statement of facts were the facts upon which the above case was submitted to the lower court:

1. The action sought a declaratory judgment with reference only to taxes on sales to Reservation Indians [fol. 68] who reside on an Indian Reservation where such sales were made by a licensed Trader at a Trading Post on an Indian Reservation.

2. That Congress has declared that permission to trade with Indians is subject to such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of Indians, and that Indian traders must secure a license to establish a trading post on an Indian Reservation; and that under the Act of Congress, the Commissioner of Indian Affairs has adopted regulations dealing with the licensing and conduct of traders on Indian Reservations.

3. All of the facts alleged in the Complaint which were all admitted by Appellees in their Answer, except (a) [fol. 69] the number used to designate a regulation adopted by the State Tax Commission, and (b) the allegation that Appellant was not liable for the tax and that the State Tax Commission was without the jurisdiction or power to impose and collect such tax.

4. That the question presented for decision was: May the State of Arizona levy and collect a tax upon the Appellant which is an Arizona corporation, licensed as an Indian Trader and conducting its business as an Indian Trader upon the Navajo Reservation, for the privilege of making sales of tangible personal property to Indians residing on the reservation.

Dated this 1st day of September, 1960.

[fol. 70] Snell & Wilmer, By Perry M. Ling, Attorneys for Appellant.

Wade Church, Attorney General, By Leslie C. Hardy, Chief Assistant Attorney General, Attorneys for Appellees.

The above statement of facts is approved as being the facts submitted to the Court and upon which the decision and judgment was based.

Yale McFate, Judge of the Superior Court.

[fol. 71]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. 101942

WARREN TRADING POST COMPANY, a corporation, Plaintiff,

—vs.—

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Defendants.

MEMORANDUM OF OPINION—September 9, 1959

The parties have stipulated to the facts. The only question is, "May the State of Arizona levy a privilege sales tax upon a licensed Indian Trader with respect to sales made by him to Indians on the Navajo Indian Reservation?"

The Arizona Sales Tax does not impose a sales tax on the *purchaser* nor upon the *sale*, but instead, places the tax on the *seller*, for the privilege of engaging in business, and fixes the gross income from sales as the base for computing [fol. 72] the tax. Thus, the incidence of the tax is not on the Indian purchaser, nor on the sale made to him, but on the trader for the privilege of transacting business as a merchant..

The U. S. Supreme Court has held that a state may tax the property of non-Indians located on an Indian reservation on the theory that such taxation does not interfere with the exercise by the Federal Government of its constitutional and statutory authority. *Thomas* v. *Gay*, 169 U.S. 264. At least two state courts have held that a state may tax

the property of Indian traders, including their *stock in trade*. *Moore* v. *Beason*, 7 Wyo. 292; 51 Pac. 875; *Cosier* v. *McMillan*, 22 Mont. 484; 56 Pac. 965; *Noble* v. *Amaretti*, 11 Wyo. 230; 71 Pac. 879. In *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, it was stated that Indian Reservations are a part of the state within which they lie, and the laws, civil and criminal, of such state, have the same force therein as [fol. 73] elsewhere within her limits, save that they can have only restricted application to *Indian wards*. Private property, within such a reservation is subject to taxation under the laws of the state.

It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned. A tax on the stock in trade is as much interference as a tax on the privilege of selling. Both are too remote to constitute interference with governmental functions.

Plaintiff makes an analogy between the Indian trader and such instrumentalities of the Federal Government as Post Exchanges, claiming the former is entitled to the same immunities from state taxation. There are, however, important distinctions:

(a) Government officers, under governmental regulations, handle and are responsible for all funds of Ex- [fol. 74] changes; whereas the Indian trader handles his own funds.

(b) Profits from operation of Post Exchanges, if any, do not go to individuals. They are used to improve the soldiers' mess and for other governmental purposes. The trader retains his profits.

(c) An Indian trader is not an officer of the government and his goods are his own private property, which he may sell indiscriminately to Indians or non-Indians.

(See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, for discussion of nature of Post Exchanges.)

The Indian trader is not, in my opinion, an instrumentality of the Federal Government, but is rather a private busi-

ness entity licensed to carry on a mercantile pursuit on the reservation under rather strict governmental supervision. The court adopts the ratio decidendi set forth in *Cosier* v. *McMillan*, 22 Mont. 484; 56 Pac. 965 and *Noble* v. *Amaretti*, 11 Wyo. 230; 71 Pac. 879.

There will be an order granting the defendants' motion [fol. 75] for summary judgment, and denying the plaintiff's motion for summary judgment. This case has been difficult to decide and the court wishes to commend counsel for both sides in the splendid briefs submitted in support of their respective positions.

Dated This 9th Day of September, 1959.

Yale McFate, Judge.

[fol. 132] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

No. 7026

WARREN TRADING POST COMPANY, a Corporation, Appellant,

v.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

Appeal from the Superior Court of Maricopa County, The Honorable Yale McFate, Judge. Judgment Affirmed.

Snell & Wilmer, Perry M. Ling, of Phoenix, Attorneys for Appellant.

Wade Church, Former Attorney General, Robert W. Pickrell, The Attorney General, and Leslie C. Hardy, Former Chief Assistant Attorney General, all of Phoenix, Attorneys for Appellees.

Norman M. Littell, of Washington, D. C., Joseph F. McPherson and Spencer K. Johnston, of Window Rock, Arizona, Attorneys for The Navajo Tribe of Indians, as Amicus Curiae.

OPINION—Filed December 4, 1963

STRUCKMEYER, Justice:

[fol. 133] Appellant, Warren Trading Post Company, appeals from a judgment determining that certain taxes are due to the State of Arizona by reason of retail sales of personal property to reservation Indians residing on the Navajo Indian Reservation.[1]

The Arizona exaction arises out of the provisions of the Arizona Privilege Transaction Act, A. R. S. § 42-1308, requiring every person within Arizona[2] who receives gross proceeds of sale or gross income from sales to acquire a license for a fee of $1.00. A. R. S. § 42-1312 imposes a tax measured by an amount equal to 2% of the gross proceeds of sales or gross income on the privilege of selling any tangible personal property at retail.[3]

---

[1] Appellant, a domestic corporation, licensed as an Indian trader by the Commissioner of Indian Affairs under Act of Congress, 22 Stat. 179, 25 U.S.C. §§ 261, 264, is authorized by Article III of its Articles of Incorporation to, among other things: (a) Buy, own, hold, sell, barter, pledge, hypothecate cattle and other livestock and in general to conduct and carry on a ranch and livestock business. (b) Deal in cattle and property. (c) Lend money. (d) Deal in shares of stock, bonds, promissory notes. (f) Buy, sell, hold and lease or construct reservoirs, canals, dams. (i) Carry on the business of purchasing, manufacturing, producing, selling, and dealing in goods and wares, merchandise and materials of every kind. (m) Maintain in addition to its principal office at Flagstaff, Arizona, one or more offices for the transactions of its business either within or without the State of Arizona.

[2] Indian reservations are within the political, governmental and geographical boundaries of Arizona. Enabling Act, § 20 (2); Draper v. United States, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107; Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456; Porter v. Hall, 34 Ariz. 308, 271 P. 411.

[3] The stipulation as to facts in the lower court specifically confined the question to taxes on sales to reservation Indians who reside on an Indian reservation. We assume that taxes arising

[fol. 134] In considering collectively the arguments presented, we observe certain conclusions which weigh heavily in the decision.

Tax immunity is never enjoyed as a matter of right but only as an incidental windfall when, and only as long as, imposition of the state tax impairs or interferes with the exercise of a federal function. Petition of S. R. A., Inc. v. State of Minnesota, 219 Minn. 493, 18 N. W. 2d 442, affirmed 327 U.S. 558, 90 L.Ed. 851, 66 S.Ct. 749. The immunity here claimed represents a severe impairment of the taxing power of Arizona. It is one we would not be disposed to sustain unless we entertained grave doubts but that a federal function was impaired.

We have repeatedly held that this tax is on the privilege or right to engage in business and is not a sales tax although generally referred to as such, that it neither imposes a tax on the purchaser nor upon sales but rather taxes the seller for the privilege of engaging in business, that the tax is the direct obligation of the retailer and not that of the consumer, and further that there is no statutory authority for the retailer to attempt to constitute himself an agent of the state for the purpose of receiving the tax and transmitting it to the state. The legal incidence of the tax falls upon the seller and not upon the buyer.[4] Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208; State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549.

[fol. 135] Were appellant an instrumentality of the United States Government by reason of its being licensed to do business with the Indians under the appropriate acts

---

out of sales to others on the Navajo Reservation have been paid and therefore the right of the state to levy and collect such taxes is not questioned.

[4] The determination of the incidence of the tax by the state court is controlling, Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1, absent facts or construction upon which Federal Constitutional issues rest. Kern-Limerick v. Scurlock, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403.

of Congress,[5] no exemption is to be implied.[6] Alabama v. King & Boozer, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R. 615. Exemption of the person upon whom the legal incidence of the tax falls is not to be implied regardless of the fact that the burden is passed on so long as Congress has not expressly exempted such person, Esso Standard Oil Co. v. Evans, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800. We conclude that the Navajo Indian Tribe, Amicus Curiae, is not entitled to assert a greater immunity from non-discriminatory taxation for traders with whom its members deal than the United States for its employees, contractees or other chosen agents, even were we certain that the economic burden must inevitably be shifted to the Indians.[7]

[fol. 136] The Arizona exaction is non-discriminatory. It is not levied against Indians or Indian tribes as such but against all who engage in the business of selling within the geographical boundaries of the State of Arizona. The fact of legal title in the United States to the Indian lands is not sufficient to effect an exclusion of the state from excise taxes unless it appears that the state by consent or cession has transferred to the United States that residuum of juris-

---

[5] The Navajo Tribe of Indians, Amicus Curiae, asserts that the Warren Trading Post Company is not a federal instrumentality.

[6] Appellant, as a licensee of the federal government, can scarcely claim a better position as an instrumentality by which the government accomplishes its purposes than an employee of the federal government, Graves v. New York, ex rel. O'Keefe, 306 U.S. 466, 83 L.Ed. 927, 59 S.Ct. 595; or a contractee, James v. Dravo Contracting Co., 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208. See Alvard v. Johnson, 282 U.S. 509, 75 L.Ed. 496, 51 S.Ct. 273, 75 A.L.R. 9.

[7] "* * * we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, 87 L.Ed. 1612, 63 S.Ct. 1284.

There is no suggestion arising out of the stipulated facts that the Indians are less able to pay this tax than other residents of Arizona of a like or similar economic status.

diction which otherwise it would be free to exercise.[8] Silas Mason Co. v. Tax Commission of Washington, 302 U.S. 186, 82 L.Ed. 187, 58 S.Ct. 233. The authority of the state may rightfully extend to all matters not interfering with the Indian's protection by the government. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246. The applicability of state law depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269, reversing Lee v. Williams, 83 Ariz. 241, 319 P.2d 998.

Historically three powers of the federal government have been used to support congressional action in legislating on Indian affairs. The War Making Power was invoked by the First Congress on August 7th, 1789, by entrusting Indian affairs to the War Department. 1 Stat. 49, 50. It was the practice and policy of the federal government during the many years of tension between Indian and non-Indian to negotiate with the tribes and to settle differences by treaty if [fol. 137] possible. See Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483. After the Civil War, it was recognized that assimilation not segregation of the Indians was necessary[9] and the use of the Treaty Making Power to deal with Indians as dependent alien nationalities was terminated by Congress in 1871. One of the last treaties was entered into with the Navajo Indians in 1868. Cohen, Federal Indian Law, 24, 210. For a more detailed background of the Navajo Tribe see Williams v. Lee, 358 U.S. 217, supra.[10]

---

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., amend. X.

[9] See for further changes in the policy of Congress, Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562.

[10] "There are many cases * * * recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations and treaties with them have been looked upon not as contracts but as public laws which could be abrogated at the will of the United States." Choate v. Trapp, 224 U.S. 665, 670, 671, 56 L.Ed. 941, 32 S.Ct. 565. Treaty rights would, of course, pre-empt those areas affected thereby and would require congressional sanctions before effective state action.

Neither appellant nor Amicus Curiae, the Navajo Indian Tribe, assert a tax immunity arising out of or supported by the terms of the Navajo Treaty with the United States.

In 1886 the Supreme Court of the United States examined a congressional enactment prescribing criminal laws for Indians living on reservations. In sustaining the plenary power of Congress to act in behalf of the Indians, the court said:

> "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States v. Kagama, 118 U.S. 375, 384, 30 L.Ed. 228, 6 S.Ct. 1109.

Since then, the recognized relation of tribal Indians together with the commerce clause of the U. S. Const., art. 1, § 8 (3), granting to Congress the power "to regulate commerce with the Indian tribes" have been treated as the [fol. 138] sources of congressional power, see Williams v. Lee, 358 U.S. 217, supra; Perrin v. United States, 232 U.S. 478, 58 L.Ed. 691, 34 S.Ct. 387; Johnson v. Gearlds, 234 U.S. 422, 58 L.Ed. 1383, 34 S.Ct. 794, without always pointing specifically to either.

We do not doubt the plenary power of Congress to legislate in behalf of its wards by providing for them such federal services as education, health and reclamation, or that Congress may permit tribal self-government. The exercise of state jurisdiction may not impede the federal government in the treatment of its wards nor may it undermine the authority of the tribe in the exercise of self-government, Williams v. Lee, supra. Neither may it impair a right granted or reserved by federal law. Village of Kake v. Egan, supra. Otherwise state laws may be applied to Indians.

Congress has customarily carved out reservations from the unreserved public domain lying within the geographical boundaries of the state either to be owned or held by the Indian tribes. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, supra. State law consistent with congressional legisla-

tion in behalf of its wards and with the tribal self-government is not excluded on these reservations.

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
>
> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and [fol. 139] lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" Surplus Trading Co. v. Cook; 281 U.S. 647, 650, 651, 74 L.Ed. 1091, 50 S.Ct. 455.

Generally, it may be said that state laws apply to the extent they do not conflict with federal Indian laws.

> "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony [or reservation], of such state laws as *conflict* with the federal enactment." United States v. McGowan, 302 U.S. 535, 539, 82 L.Ed. 410, 58 S.Ct. 286. (Emphasis supplied).[11]

We do not find that Arizona by taxing appellant interferes with the United States in the use of reservation lands for the purposes for which they were established or that its tax tends to thwart the purpose of the federal government in caring for its Indian wards and leading them into the habits and ways of civilized life.

---

[11] See also New York ex rel. Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307; Draper v. United States, 164 U.S. 240, supra. Note too United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869.

This brings us to the ultimate proposition advanced by the Navajo Indian Tribe that the commerce clause of the federal constitution by its own force creates an area of trade free from interference by the state. There is here equated the power to regulate commerce among the several states with the Indian tribes in the argument that the states are not allowed "one single—tax—worth of direct interference with the free flow of commerce." But we do not understand that the commerce clause provides an automatic preemption to the federal government of every area wherein conceivably Congress might act.

[fol. 140] If there is an analogy to be drawn from the interstate commerce clause, still the possession of power in Congress does not exclude all state power. Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 89 L.Ed. 1915, 65 S.Ct. 1515. A state may legislate freely upon those phases of commerce which are left unregulated by the nation and if the prohibition of state action is only inferable from the scope and purpose of the federal legislation, it must be clear that state action is inconsistent with the federal provisions. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 86 L.Ed. 754, 62 S.Ct. 491. Local authorities are not foreclosed from regulating matters of local concern merely because there may be some incidental but not burdensome effect on interstate commerce. Calif. v. Zook, 336 U.S. 725, 93 L.Ed. 1005, 69 S.Ct. 841; Cooley v. The Board of Wardens, 12 How. 299, 13 L.Ed. 996.

This brings us to the further assertion that the federal statutes on trading with Indians pre-empt the field of sales to Indians upon the Navajo Indian Reservation as against the Arizona Transaction Privilege Tax. By act of August 15, 1876, 25 U.S.C. § 261, Congress provided that:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

and by § 262:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the

fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may pre-
[fol. 141] scribe for the protection of said Indians."

It is argued that if appellant "proved his fitness to trade with the Indians to the satisfaction of the Commissioner of Indian Affairs and secured a license from the Commissioner, he would thereupon have the right, whether or not he applied for or received a Transaction Privilege Tax License from the defendants [members of the State Tax Commission], to set up as a trader on the Navajo Indian Reservation." But we do not think it follows because appellant is licensed by the Commissioner of Indian Affairs to engage in trade that he has also been commissioned to disregard state laws. Rather, we would think that the Commissioner of Indian Affairs in considering whether a trader is a "proper person" would consider whether he will or has complied with such state laws as are constitutionally consistent with the licensee's business.

By the Arizona Enabling Act, § 20, 36 Stat. 557, 568, the people of this state agreed with the United States to forever disclaim all right and title to all lands lying within Arizona's boundaries owned or held by any Indian or Indian tribes and that " * * * until the *title* of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Absolute jurisdiction does not mean invariably exclusive jurisdiction; the word "absolute" carries the meaning of undiminished not exclusive. Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2nd 573, 82 S.Ct. 562.

The same section of the enabling act further provides [fol. 142] that " * * * all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe." The taxation here forbidden is that of reservation lands. There is no general ceding of the taxation authority of the state. Congress has not provided non-taxability from excises although it could have.

> "If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, supra.

Moreover, any inference that this trader was intended by Congress to be relieved of the Arizona general non-discriminatory privilege transaction tax is to the contrary. By 61 Stat. 644, 4 U.S.C. §§ 105, 109, Congress authorized the states to extend sales taxes to persons residing on or carrying on their businesses and to transactions occurring in federal areas. While Congress specifically excluded Indians "not otherwise taxed," it did not purport to protect those who trade with Indians from taxation.[12]

We restate our basic conclusions.

First, assuming that appellant is an instrumentality of the United States government, no immunity from the tax will be implied.

Second, the test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws.

[fol. 143] Under the stipulated facts of this case we hold that the Arizona exaction as applied to the appellant does not thwart the will of Congress in its treatment of its Indian wards nor is it inconsistent with the power of Congress to regulate trade with the Indian tribes.

The judgment of the court below is affirmed.

Fred C. Struckmeyer, Jr., Justice.

Concurring: Charles C. Bernstein, Chief Justice; Jesse A. Udall, Vice Chief Justice; Renz L. Jennings, Justice.

---

[12] We are not called upon to determine precisely the meaning of the language used by Congress. It is sufficient to say that Congress could have excluded appellant from the scope of the Arizona tax. But it did not.

[fol. 144] Lockwood, Justice (dissenting):

Chief Justice Waite has defined the judicial function in Minor v. Happersett, 21 Wall. 162 (1874) at 178:

> "Our province is to decide what the law is, not to declare what it should be . . . If the law is wrong, it ought to be changed; but the power for that is not with us."

In this case, I am convinced the majority of the Court misconceives what the law is in its concern over what the law in strict justice should be. The efforts of the federal government to protect the Indians may too long have held them as quasi-citizens living apart and lagging behind the rest of the nation in both privileges and proportionate responsibilities. Congress may have continued to hold too tightly its reins of control over commerce with tribal Indians. It may be that the system of favored "Indian traders" under license and control of the Commissioner of Indian Affairs is an anachronism in our modern economy. But it is not the function of this Court to change federal Indian policy. We should interpret, not amend the existing federal law and, on that basis, we should invalidate the tax in this case. In my opinion, Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians—an area of commerce delegated exclusively to the federal government in the Commerce Clause and a privilege granted solely by the Commissioner of Indian Affairs under 25 U.S.C. § 262.

[fol. 145] Before examining the relation between this privilege tax[1] and the Commerce Clause, the character of the

---

[1] The following sections dealing with the transaction privilege tax are pertinent to this case. A.R.S. § 42-1308 provides in part: "A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the [Arizona state tax] commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license." * * * "F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days." [As amended, Laws 1956, Ch. 98, § 1.] Section 42-1309,

problem in this case needs to be more sharply focused. The majority treats this as an "exemption" case and, consequently, interprets strictly against the taxpayer. This is wrong. No exemption for an Indian trader exists in Arizona statutes; the appellant admits this. This case involves the *scope* of the Arizona privilege tax. While taxing power is inherent in the sovereign states, the states delegated certain taxing powers to the federal government in the Com- [fol. 146] merce Clause.[2] Therefore in this case, we must

---

in part reads: "A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities . . ." And A.R.S. § 42-1312 reads as follows: "A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail . . ." Moreover, any person against whom this tax is levied may be enjoined from continuing in business until he has complied with the statute. A.R.S. § 42-1334.

[2] The states delegated to the federal government the exclusive power to tax the privilege of trading with Indians. Regarding another trade area included within the Commerce Clause, the United States Supreme Court stated in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) at 608: "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate Commerce when they gave Congress the power 'To regulate Commerce with foreign Nations, and among the several states, [and with the Indian Tribes].' U.S. Const. Art. 1, § 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress." Hence, the statement in the majority opinion that, by the language of the Enabling Act and the Arizona Constitution, Arizona ceded

determine whether the tax commission has trespassed upon an area of commerce delegated to the federal government.

Consequently, for the purpose of determining the scope of this tax, we should observe established rules of construction. First, when construing the ambit of a tax, as opposed to an exception to a tax, this Court has traditionally interpreted favorably to the taxpayer and strictly against the tax commission. Alvord v. State Tax Commission, 69 Ariz. 287, 213 P.2d 363 (1950). In addition, since 1935 when the Twelfth Legislature adopted this tax until 1956 when the tax commission issued Regulation 2.18.5 taxing Indian traders, the commission in administering the law had not construed the tax statute as including Indian traders. Although long administrative interpretation is not controlling, the courts give weight to such an interpretation when construing the law. Alvord v. State Tax Commission, [fol. 147] supra; Van Veen v. County of Graham, 13 Ariz. 167, 108 Pac. 252 (1910). And in cases concerning possible exercise of power by states over Indian affairs, the Supreme Court of the United States, on the basis of the Commerce Clause, appears to have raised a presumption against such state action. See, e.g., Williams v. Lee, 358 U.S. 217, 220-221 (1959); Kake Village v. Egan, 369 U.S. 60, 74-76 (1962); and Worcester v. Georgia, 6 Pet. 515, 561 (1832), Chief Justice Marshall's great decision which first announced this principle.

The all-important subject of this case is the relation between the Commerce Clause and the Arizona privilege tax. The Commerce Clause delegates to the federal government the power to control three trade areas: interstate, foreign, and Indian commerce. This congressional power over Indians has been described as a power as broad as that to regulate foreign commerce,[3] and broader than that to regu-

---

only the power to tax reservation lands is misleading. This statement ignores the division of taxing power in the federal constitution.

[3] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), where the Supreme Court declared at 194: "Under the articles of confederation the United States had the power of regulating the trade and managing all affairs with the Indians

late interstate commerce.[4] Indeed, this federal power over [fol. 148] Indians may justifiably be characterized as plenary.[5]

Each trade area in the Commerce Clause may have been delegated to the federal government for a different reason. But a principle common to all three trade areas emerges from the Commerce Clause. A long line of "interstate commerce" and "foreign commerce" cases reveals a prohibition which applies equally to this "Indian commerce" case: A state cannot tax the privilege of engaging in an area of trade delegated exclusively to the federal government in the Commerce Clause.

Historically, a tax phrased in terms of a privilege for engaging in interstate commerce has been considered beyond

---

not members of any of the States; provided that legislative right of a State within its own limits be not infringed or violated. [Article IX, Articles of Confederation.] Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—*a power as broad and as free from restrictions as that to regulate commerce with foreign nations.*" (Emphasis added.)

[4] See 1 Ops. Att'y Gen. 645 (1824); 1 Willoughby on the Constitution of the United States, 2d ed. § 226, p. 397; Story on the Constitution of the United States, § 1097; and, especially, Prentice and Egan, The Commerce Clause of the Federal Constitution, p. 342 (1898): "The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks. A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce."

[5] Worcester v. Georgia, supra; Willoughby, supra, pp. 379-402, 1327, 1328.

the power of the states.[6] *Any* such tax "burdens" interstate commerce. Alpha Portland Cement Co. v. Massachusetts, [fol. 149] 268 U.S. 203, 217 (1925). Two recent cases restating this position that the Commerce Clause completely protects interstate commerce from state privilege taxes are Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) and Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389 (1952). A state has no power to tax the privilege of doing interstate commerce because it is a privilege granted by the federal, not the state government.

The United States Supreme Court has not only forbidden a state privilege tax as a condition precedent to the beginning of an interstate business, but it also has denied the power of a state to impose a tax on the privilege of doing an exclusively interstate business after the business has begun. Such taxes have been struck down even though they were fairly measured according to the connections of a taxpayer with the taxing state. In *Spector Motor*, for example, the Supreme Court invalidated a Connecticut privilege tax imposed on an interstate trucking corporation and said at 609:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

See also, Alpha Portland Cement Co. v. Massachusetts, supra; Memphis Steam Laundry Cleaners, Inc. v. Stone, supra; Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

The United States Supreme Court has repeatedly invalidated a state tax phrased in terms of a privilege for [fol. 150] engaging in interstate commerce. This Court recognized this prohibition against such a tax in Combus-

---

[6] The tax involved in the instant case has also been phrased in terms of a tax on the privilege of engaging in business. See A.R.S. § 42-1308 and Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955).

tion Engineering v. Arizona State Tax Commission, 91 Ariz. 253, 371 P.2d 879 (1962). The United States Supreme Court has also struck down state taxes on the privilege of doing foreign commerce. Brown v. Maryland, 12 Wheat. 419 (1827), for example, concerned a Maryland tax imposed on a foreign importer. The Court invalidated the tax on alternative grounds: the Import-Export Clause[7] and the Commerce Clause. Discussing the impact of the Commerce Clause on the state tax, the Court said at 447:

> "Congress has a right, not only to authorize importation, but to authorize the importer to sell . . . The power claimed by the State [of Maryland] is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

See also Crew Levick Company v. Pennsylvania, 245 U.S. 292 (1917).[8]

Although no court before this has ruled on the validity of a state tax which is imposed on the privilege of doing business with the Indians, the principle prohibiting such a tax on interstate and foreign commerce should also apply to this case. Certainly the Indian trader here is no less favored by the Commerce Clause than is the interstate trucker in *Spector Motor* and the foreign importer in [fol. 151] *Brown*. From the Commerce Clause emerges a principle forbidding a state tax on the privilege of engaging in an area of trade delegated exclusively to the federal government. Consequently, in my opinion, this privilege tax is invalid when imposed on a federal Indian trader. Arizona has no power to tax the privilege of doing business with the Indians because it is a privilege granted solely by the federal government.

---

[7] U.S. Constitution, Article 1, § 10, Clause 2.

[8] Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 75 (1946), cites *Brown* and *Crew Levick* with approval, although the *Richfield* decision was based on the Import-Export Clause.

Indeed, this prohibition arising from the Commerce Clause applies with greater force in the area of Indian commerce than in the other two trade areas. First, as opposed to interstate and foreign commerce, doing business with the Indians is a privilege conditionally granted by the federal government, not an individual right. While any person may engage in interstate and foreign commerce in the absence of regulations to the contrary, no one may sell to Indians unless licensed and rigorously regulated by the Commissioner of Indian Affairs.

Secondly, we have here a stronger case against a state privilege tax than in the case of foreign or interstate commerce because Congress has more fully occupied and regulated the area of Indian commerce. The federal government, for example, neither grants nor regulates the privilege of engaging in interstate commerce in the manner it grants and regulates the privilege of engaging in Indian commerce. Under the present law, the Commissioner of Indian Affairs has the exclusive power to regulate the kind, quality and price of the goods sold to the Indians. [fol. 152] 25 U.S.C.A. §§ 261-264.[9] Implied prohibitions

---

[9] § 261 *"Power to appoint traders with Indians.* The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.

§ 262 *"Persons permitted to trade with Indians.* Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.

§ 263 *"Prohibition of trade by President.* The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any

from the Commerce Clause set certain minimum conditions for engaging in interstate and foreign commerce. For Indian commerce, however, we have not only the implied prohibitions from the Commerce Clause, but a complete set of federal regulations which does everything except expressly prohibit this tax.[10]

[fol. 153] Even so, the majority in this case, cites language from Oklahoma Tax Commission v. United States, 319 U.S. 598, 607 (1943), an estate tax case, and concludes: "Congress has not provided non-taxability [of Indian traders] from excises although it could have." As we have seen, the majority persists in treating this as an "exemption" case and in construing strictly against the taxpayer. Consequently, to support its position, the majority uses language from *Oklahoma Tax Commission,*[11] an "exemption"

Indians of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264 "*Trading without license; white persons as clerks.* Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500 . . ."

[10] The set of federal regulations regarding the operation of radio stations also does everything except expressly prohibit such a state tax. In Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U.S. 650 (1936), Justice Stone, writing for an unanimous court, invalidated a state occupation tax measured by gross receipts (which is really only another name for a privilege tax) when imposed upon a radio station operating under a federal license. One of the controlling facts was the requirement of the federal license. The act involved in the case, the predecessor of the Federal Communications Act, prohibited "any save licensees to operate broadcasting apparatus." The resemblance of this act to the federal regulation in the instant case, § 261, is apparent.

[11] The majority quotes twice from *Oklahoma Tax Commission:* While some language from that case may superficially appear applicable, it actually has no relevance to the instant case. Not only is *Oklahoma Tax Commission* an "exemption" case, but Oklahoma Indians are anomalous. The United States Supreme

case. But this is a "scope" case; it concerns the ambit of the Arizona tax in relation to the powers delegated to the federal government in the Commerce Clause. Therefore, this Court should interpret favorably to the taxpayer. Alvord v. State Tax Commission, supra.

Moreover, the absence of express Congressional prohibition of this tax should not be interpreted as implied consent. At the time the federal regulations were passed, such a tax had never been proposed. In addition, where the power is exclusive, as it is here, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction. Robbins v. Taxing [fol. 154] District of Shelby County, 120 U.S. 489 (1886); Philadelphia & S. Mail Steamship Co. v. Pennsylvania, 122 U.S. 326 (1886); Leisy v. Hardin, 135 U.S. 100 (1889); and In re Rahrer, 140 U.S. 545 (1891). Consequently, the Commerce Clause precludes this tax on appellant, even in the absence of a specific prohibition by Congress.

The majority restates its two basic conclusions at the close of its opinion. The first conclusion regarding no tax exemption for a federal instrumentality is immaterial; appellant specifically abandoned this "instrumentality" theory during oral argument. The second conclusion has two premises: first, this tax imposed by Arizona is not "inconsistent" and, second, it is not "burdensome" to federal purposes or laws. I will analyze these premises in inverse order.

When determining that this tax does not have a "burdensome effect" on Indian commerce, the majority uses the "local activity" test from California v. Zook, 336 U.S. 725

Court recognized this in *Oklahoma Tax Commission* at 604. See also Cohen, Federal Indian Law (1956) 1051. Consequently, a case involving Oklahoma Indians does not necessarily apply to this case involving Navajo Indians. The relation between the Navajo Indians and Arizona differs significantly from the relation between the Oklahoma Indians and Oklahoma. See also Williams v. Lee, supra, at 222-223. Arizona has assumed fewer responsibilities than Oklahoma and the Navajo Indians have exercised a greater degree of tribal autonomy than the Oklahoma Indians.

(1949) and Cooley v. The Board of Wardens, 12 How. 299 (1851). This reasoning suffers from what might be termed a "transplanted category." [12] This is what Walter Wheeler Cook warned against when he wrote:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." [13]

[fol. 155] A test developed for the purpose of protecting the free flow of interstate commerce does not necessarily accomplish the purpose of protecting Indian commerce. The "local activity" test of *Zook* and *Cooley* has relevance when applied to an interstate commerce problem; Congress wanted to protect the free flow of trade between states, but did not intend to regulate local activities. But this "local activity" test has no relevance when applied to this Indian commerce problem. Formerly, Indians were considered "the wards of the nation." United States v. Thomas, 151 U.S. 577 (1894). Recent decisions have described the role of the federal government in relation to Indians as a protective trusteeship. See, e.g., United States v. McGowan, 302 U.S. 535 (1938). Congress, therefore, has the duty of regulating commerce with the Indians, even if this commerce appears to be a "local activity" because it takes place wholly within the boundaries of Arizona. Consequently, it is fallacious to reason that this tax does not constitute a burden on Indian commerce just because it is measured by a "local activity." [14] So much for the majority's "burdensome" reasoning.

---

[12] For an enlightening discussion of this fallacy, see Hancock, "Fallacy of the Transplanted Category," 37 Can. Bar Rev. 535 (1959).

[13] Cook, Logical and Legal Bases of the Conflict of Laws (1942), p. 159 quoted in Hancock, *op. cit.*, p. 575.

[14] For the same reasons, we would fallaciously transplant another category if we applied to the instant case the "intrastate transaction" test of International Harvester Co. v. Department of the Treasury of Indiana, 322 U.S. 340 (1944).

And when determining that this tax is not "inconsistent" with federal purposes, the majority gives us an interesting history of federal powers and then concludes, without further explanation, that this tax does not conflict with federal [fol. 156] laws. But the Department of the Interior, in a formal opinion by the First Assistant Solicitor, could not have been more clear and more definite in this regard:

> "Question has arisen as to how far Indians and persons trading with Indians are subject to the sales taxes imposed by Arizona law. Since the problem is a general one and the Arizona statutes in question are not dissimilar in substance from the sales tax laws of other States and since the subject has been previously covered only in informal memoranda, I have determined to treat the question in a formal opinion.
>
> * * *
>
> "The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians.
>
> * * *
>
> "Where Congress has exercised its authority it is axiomatic that the field is closed to State action, Sperry Oil and Gas Co. v. Chisholm, 264 U.S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions.
>
> * * *
>
> "Traders on Indian reservations who are non-Indians are, in my opinion, required to take out licenses under Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their

> transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians.
>
> • • •
>
> [fol. 157] "The preceding part of this opinion demonstrates that sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is added to the price of the article to cover the tax. Such additions to the price of articles by State action are clearly interferences with the authority of the Commissioner of Indian Affairs to regulate the prices at which goods shall be sold to the Indians." 57 Interior Dept. Decisions 124 (May 8, 1940).[15]

An "interference with the authority of the Commissioner of Indian Affairs" is inconsistent with federal purposes and laws. Despite this unequivocal language, the majority opinion audaciously advises the Commissioner of Indian Affairs, when determining whether a trader is a "proper person", to "consider whether he will or has complied with" the imposition of the tax in question. So much for the majority's "inconsistent" reasoning.

The majority opinion refers to 61 Stat. 641, §§ 105 and 109 (commonly referred to as the "Buck Act") as a specific congressional authorization to the states to extend sales taxes to persons residing in or carrying on their business and to transactions occurring in "federal areas." Section 110(e) of the Buck Act defines "federal area":

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States [fol. 158] or any department, establishment, or agency, of the United States; . . ."

---

[15] The Arizona statutes permit a seller to "add" the tax to the sale price separately, or to "absorb" it in the specified sale price. Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955). It would obviously be specious reasoning to say that a seller in "absorbing" the tax fails to make his price cover the amount of the tax. In either event, it is ultimately passed on to the purchaser.

This definition does not include Indian reservations. An Indian reservation is land held by the United States for Indian use, not for use by the United States. See Your Food Stores, Inc. v. Village of Espanola, 361 P.2d 950 (N.M. 1961). All the Buck Act purports to do is subject to state taxation persons previously not taxed because the transaction "occurred in whole or in part within a federal area."[16] The basis for not taxing an Indian trader is not the physical location of the trading post, but the fact that such a trader conducts "commerce with the Indian Tribes" within the language and purpose of the Commerce Clause. If the legislation regulating Indian traders was based upon the power of Congress to control entry and operations on the area where the trading post is located, then perhaps the Buck Act might be construed to give congressional consent to state taxation. But state taxation in the instant case conflicts with federal policy based on Commerce Clause regulation, rather than on proprietary or jurisdictional regulation. See 58 Interior Dept. Decisions 562 (December 24, 1943).

[fol. 159] The thesis of the majority opinion, reduced to its simplest elements, is: The Arizona tax in question is imposed on all persons within the territorial boundaries of the state for the privilege of engaging in the business of selling at retail. The state has imposed the tax on the seller, and it is not concerned with his manner of sale or choice of buyers. He is not required to collect the tax from the buyer. He may do so by collecting it in addition to the specified selling price, or he may "absorb" it in the price to the purchaser.[17] The state has no interest in the

[16] See, e.g. Bowers v. Oklahoma Tax Commission, 51 F. Supp. 652 (D.C. Okla. 1943) (contractors on Fort Sill Military Reservation); Hill v. Joseph, 129 N.Y.S.2d 348 (1954) (concessionaries on Bedloe's Island); Kiker v. City of Philadelphia, 31 A.2d 289, cert. denied 320 U.S. 741 (1943) (employees of League Island Navy Yard); Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) (employees of naval ordinance plant); City of Springfield v. Kenney, 104 N.E.2d 65 (Ohio App. 1951) (residents of federal housing project):

[17] Arizona State Tax Commission v. Garrett Corp., supra.

source which the seller uses in remitting the tax, although it is calculated on the selling price. Therefore if the seller chooses to sell to Indians on a reservation, this neither relates to the imposition of the tax on the trader, nor does it interfere with or violate any federal constitutional or statutory provision.

Since the trader in this case is a business corporation, not a charitable or philanthropic organization, it would be unrealistic to suppose that the trader would abandon the general business practice of passing a tax on to the consumers in some form. The factor which the majority opinion overlooks or ignores is that in doing so, the trader must adjust his selling prices. In turn, this adjustment of selling prices becomes a factor *created by state fiat* which the Commissioner of Indian Affairs and the trader must take into consideration in determining the prices at which a trader must sell merchandise to reservation Indians. This [fol. 160] applies to traders already licensed by the Commissioner, as well as to those making application for the privilege in the future.

The majority maintains this situation does not create an interference with the regulation of commerce with the Indian tribes. I maintain that it does.

Lorna E. Lockwood, Justice.

[fol. 161]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

[Title omitted]

EXCERPT FROM APPELLANT'S MOTION FOR REHEARING—
Filed December 19, 1963

* * * * * * *

[fol. 162] 3. Assuming, arguendo, that the Court used the proper legal test, it appears that the Court's opinion is based, in part, upon incorrect factual assumptions:

A. The Court assumed that the privilege tax is not inconsistent with or burdensome upon federal laws and purposes, yet:

1. It is inconsistent with the federal purpose of permitting reservation self-government as it conflicts with a privilege tax on traders imposed by the Papago tribe, and

* * * * * * *

[fol. 163] Respectfully submitted,

Snell & Wilmer, By: Edward Jacobson, Attorneys for Appellant.

[fol. 165]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

EXCERPT FROM APPELLANT'S MEMORANDUM SUPPORTING MOTION FOR REHEARING—Filed December 19, 1963

* * * * * * *

[fol. 174] III. *Invalid Factual Assumptions:*

As stated hereinabove, we feel the Court may have overlooked the character of tax involved in this case, and thus applied an improper test for determining the constitutionality of the tax.

However, even assuming arguendo that the Court was correct in using the "undue burden" test (instead of the no-burden rule) when considering a privilege tax on one [fol. 175] of the activities in the Commerce Clause of the Constitution, we believe the Court in reaching its decision made certain inaccurate factual assumptions, which, if corrected, would cause the Court by its own reasoning in the majority opinion to reverse its position.

A. *The Court assumed as a factual matter that the state privilege tax was not inconsistent with or burdensome upon federal laws and purposes.*

In concluding its opinion, the Court summarized its primary reason for the decision as follows:

"[T]he test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws."

In reaching this conclusion, we suspect that the Court may have overlooked the following:

1. One of the Arizona Indian tribes (the Papagos) recently has enacted its privilege transaction tax on traders making reservation sales. Before passage of the law by the tribe, it had to be, and was, approved by the United States Department of the Interior.

   In the words of the United States Supreme Court in *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 70 L.Ed. 2d 573, 82 S.Ct. 562, 569:

   > "... the test of whether a state law could be applied on Indian reservations ... was whether the application of that law would interfere with reservation self government."

   We submit that the imposition of Arizona's Transaction Privilege Tax interferes generally with the [fol.176] Federal purposes of permitting reservation self-government and interferes specifically with the ability of the Papagos (and any other tribe that may hereafter so desire) levying a 3% tax on the privilege of Indian traders making sales on the reservation. The interference and conflict consists of dual sovereignties imposing an identical regulatory privilege tax at even the same rate and for the privilege of engaging in the same business activity.

* * * * * * *

[fol. 180] Respectfully submitted,

Snell & Wilmer, By Edward Jacobson, Attorneys for Appellant.

[fol. 181]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

[Title omitted]

EXCERPT FROM RESPONSE TO PETITION FOR REHEARING—
Filed December 30, 1963

* * * * * * *

[fols. 183-184]

IV

The taxpayer herein raises a question that is, strictly speaking, outside of the record. It mentions the fact that one Arizona tribe with the permission of the Secretary of the Interior had adopted a tax of its own similar to the state tax. The taxpayer then argues that this is an interference with tribal government for the reason apparently that two "sovereignties" are taxing the same thing. However, we are cited no cases and can find none holding that two tax levying bodies cannot tax the same business, the same transaction, or even the same property. After all, both the state and the United States tax income, the state, county, city, high school, common school and junior college districts all tax the same land and the state, city and federal government tax certain business transactions. (The federal tax is limited to luxuries and miscellaneous items such as tires, but the principle is the same.) The fact that two bodies both tax the same thing does not defeat the autonomy of either.

* * * * * * *

[fol. 186] Respectfully submitted,

Robert W. Pickrell, The Attorney General, Philip M. Haggerty, Assistant Attorney General, Attorneys for Appellees.

[fol. 187]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

January 8, 1964

No. 7026

[Title omitted]

NOTICE OF MINUTE ENTRIES OF ORDERS OF JANUARY 7, 1964—ORDER DENYING MOTION FOR REHEARING, ETC.

The following action was taken by the Supreme Court of the State of Arizona on January 7, 1964, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing—DENIED. Justices Lockwood and Jennings voted to grant.

ORDER: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

ORDER: Petition of Papago tribe to intervene and to file brief Amicus Curiae—DENIED, as extending the issues. Bristor v. Cheatham, 75 Ariz. 227, 255 P. 2d 173."

Sylvia Hawkinson, Clerk, By L. Brooks, Assistant Clerk.

To—

Snell & Wilmer, 400 Security Building, Phoenix, Arizona;

Attorney General, Attention: P. M. Haggerty, Phoenix, Arizona;

Walter F. Wolf, Jr., P.O. Box 177, Window Rock, Arizona;

Edward B. Berger, 500 Phoenix Title Bldg., Tucson, Arizona.

[fol. 188]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

MANDATE—January 13, 1964

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa.

Greeting:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between

Case No. 101942

WARREN TRADING POST COMPANY, a corporation, Plaintiff,

v.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as Members of the Arizona State Tax Commission, and THE ARIZONA STATE TAX COMMISSION, Defendants,

---

said Superior Court on October 7, 1959 entered the following Summary Judgment:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the defendants, as constituting the members of the Arizona State Tax Commission, and the Arizona State Tax Commission, have summary judgment against plaintiff for transaction privilege taxes assessed by the defendants against the plaintiff for sales of tangible personal property made by plaintiff, as a licensed Indian trader, to Reservation Indians, which sales were made by plaintiff at its Trading Post on the Navajo Indian Reservation within the State of Arizona, between the 1st day of November, 1956, to and including the 31st day of December, 1957, in the total amount of $2,886.49, together with inter-
[fol. 189] est thereon at the rate of ½ of 1% per month, or fraction of a month, from the date of this judgment until paid."

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

[fol. 190] And Whereas, in April, in the year of our Lord one thousand nine hundred and sixty-three, the said cause came on to be heard before the said Supreme Court, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the fourth day of December in the year of our Lord one thousand nine hundred and sixty-three, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on December 19, 1963, Appellant filed Motion for Rehearing, on consideration of which the Court on January 7, 1964, ordered that the Motion for Rehearing be denied and further ordered: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

[fol. 191] You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable Jesse A. Udall, Chief Justice of the Supreme Court of the State of Arizona, the thirteenth day of January, in the year of our Lord one thousand nine hundred and sixty-four.

Sylvia Hawkinson, Clerk of the Supreme Court of the State of Arizona.

[fol. 192] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 1, 1964

I. Notice is hereby given that Warren Trading Post Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the Mandate, issued by the Supreme Court of the State of Arizona to the Superior Court of Maricopa County on January 13, 1964, which Mandate (pursuant to Arizona Supreme Court Rule 14(a)) constitutes the judgment enforcing the Decision of the Supreme Court of the State of Arizona entered on December 4, 1963, which Decision became final by the Order of the Supreme Court of the State of Arizona denying rehearing entered January 7, 1964, and which Decision affirmed the judgment of the Superior Court of Maricopa County entered in this action on October 7, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

[fol. 193] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Abstract of Record on Appeal, filed March 30, 1960.

(b) Appellant's Opening Brief, filed July 29, 1960.

(c) Supplemental Abstract of Record, filed September 8, 1960.

(d) Appellees' Reply Brief, filed September 16, 1960.

(e) Appellant's Reply Brief, filed October 14, 1960.

(f) Decision of the Supreme Court of the State of Arizona, entered December 4, 1963.

(g) Appellant's Motion for Rehearing with Memorandum in Support thereof attached thereto, filed December 19, 1963.

(h) Response to Petition for Rehearing, filed December 30, 1963.

(i) Minute Entries of Orders of the Supreme Court of the State of Arizona rendered on January 7, 1964 (which, among other actions, denied the Motion for Rehearing).

(j) Copy of Mandate, issued January 13, 1964.

(k) This Notice of Appeal.

III. The Supreme Court of Arizona has construed A.R.S. § 42-1312.A (being that portion of the Arizona Transaction Privilege Tax which levies a tax upon the privilege of engaging in the business of selling tangible personal property at retail which tax is measured by the [fol. 194] gross proceeds of sales or gross income from the business) as being applicable to and authorizing a tax upon an Indian Trader licensed under 25 U.S.C. §§ 261-264, whose trading post is located on a portion of the Navajo Indian Reservation lying within the boundaries of the State of Arizona, and who is there engaging in the business of making retail sales to Indians living upon the Reservation.

The basic question presented is:

Whether A.R.S. § 42-1312.A as so construed is invalid as being repugnant to and a violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution which states:

"Section 8. The Congress shall have power . . .

"To regulate Commerce . . . with the Indian Tribes; . . ."

The foregoing basic question is intended to include every subsidiary question fairly comprised therein including but not limited to:

(a) Whether transactions of the character above described constitute " . . . Commerce . . . with the Indian Tribes . . . " within the purview of Article I, Section 8, Clause 3 of the United States Constitution.

(b) Whether the Arizona Transaction Privilege Tax (including but not limited to that section thereof referenced in the basic question) is, in fact, a privilege tax upon the privilege of engaging in a variety of named businesses measured by the gross proceeds of sales or gross income therefrom.

(c) Whether any application of a State Privilege Tax [fol. 195] upon " . . . Commerce . . . with the Indian Tribes . . . " constitutes, per se, an undue burden upon such commerce; or whether, contrariwise, such application factually must be proved to be inconsistent with, contrary to, burdensome upon or in frustration of federal laws and purposes before such tax would be held to constitute an undue burden thereon, and whether in the event the latter be the case, the facts set forth in the record of this case constitute such a factual showing as to amount to an undue burden.

(d) Whether a State Privilege Tax which constitutes an undue burden upon " . . . Commerce . . . with the Indian Tribes . . . " is invalid as being repugnant to and in violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution set forth in the basic question above.

(e) Whether the Buck Act (4 U.S.C. §§ 105-110) is applicable to Indian Reservations lying within the boundaries of the several states; and if applicable, whether the Buck Act as so construed is itself invalid as being repugnant to and a violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution set forth in the basic question above.

Filed this 1st day of April, 1964.

Snell & Wilmer, By: Edward Jacobson, Attorneys for Warren Trading Post Company, Appellant.

Proof of Service (omitted in printing).

[fol. 197] Triple Certificate to foregoing transcript (omitted in printing).

[fol. 199]

SUPREME COURT OF THE UNITED STATES

No. 115, October Term, 1964

WARREN TRADING POST COMPANY, Appellant,

vs.

ARIZONA STATE TAX COMMISSION, et al.

Appeal from the Supreme Court of the State of Arizona.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.